

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





**BRIEF FOR APPELLANTS AND JOINT APPENDIX**

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 11,720**

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QUINTINA D'AMBROSIO and FRED G. D'AMBROSIO,  
*Appellants,*

v.

DR. CAROLYN S. PINCOCK and DR. GLENN  
PINCOCK, *Appellees.*

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**Appeal from the United States District Court for the  
District of Columbia**

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*United States Court of Appeals  
For the  
District of Columbia Circuit*

FILED JUN 24 1953

*Joseph W. Stewart*  
CLERK

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**STATEMENT OF QUESTION PRESENTED**

The question is whether there was sufficient evidence of negligence to go to the jury in a personal injury case in which the Court directed a verdict at the close of plaintiff's case.





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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUINTINA D'AMBROSIO and FRED G. D'AMBROSIO,  
*Appellants,*

v.

DR. CAROLYN S. PINCOCK and DR. GLENN  
PINCOCK, *Appellees.*

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Appeal from the United States District Court for the  
District of Columbia

---

BRIEF FOR APPELLANTS AND JOINT APPENDIX

---

## JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia, dated October 8, 1952, granting defendants' motion for a directed verdict at the close of plaintiffs' case. This Court has jurisdiction under the Act of June 28, 1948, c. 646, 62 Stat. 929 U.S.C.A. Title 28, Section 1291.

**STATEMENT OF CASE**

This is an action for damages sustained when appellant, Quintina D'Ambrosio, fell on the private sidewalk owned and maintained by appellees, Doctors Pincock, and used by the defendants as an entrance and exit from their professional offices (Jt. App. 1-3).

The evidence before the Court showed that the appellees were owners of and maintained the premises 4000 Sixteenth Street, Northwest, in the District of Columbia; and that a portion of the premises was set aside for use exclusively for appellees' professional purposes (Jt. App. 33, 36-37). Both appellees are practicing physicians with their professional offices at the above address (Jt. App. 33, 36). Dr. Carolyn Pincock is a pediatrician and treats children exclusively; while Dr. Glenn Pincock has a general practice (Jt. App. 33, 36). The appellees maintain a separate entrance for their offices, which has a private walkway leading from the public sidewalk to the door of the offices (Jt. App. 33, 35, 37). This walkway is used exclusively for business purposes (Jt. App. 36, 37). An average of fifty to sixty patients use this entrance per day (Jt. App. 37).

On September 6, 1949, appellant, Mrs. D'Ambrosio, took her seven-year-old daughter to Dr. Carolyn Pincock's office for an immunization injection (Jt. App. 7-8). They arrived at the office between 1:30 p.m. and 1:45 p.m. (Jt. App. 8), using the private entrance-way without incident. Upon leaving the office about one hour later (Jt. App. 9), and while walking down the private walk in question, Mrs. D'Ambrosio slipped on a branch of a tree, which was then on said walk, and fell heavily, severely injuring herself (Jt. App. 10, 20-21, 24-25). When she fell, she felt as though she were "on a slide" (Jt. App. 21). She went forward on the slope of the sidewalk (Jt. App. 27).

Just prior to the fall, Mrs. D'Ambrosio was leading her child with her left hand and soothing her as the child was crying and upset as a result of the injection (Jt. App. 9). As it was cloudy and a little "breezy" Mrs. D'Ambrosio



was at the time carrying two umbrellas—her own and her daughter's—in her right hand, and had a pocketbook on her right arm (Jt. App. 9, 16, 18). She was wearing normal dress shoes (Jt. App. 12) which had been worn before (Jt. App. 19-20). Appellant<sup>1</sup> did not see the branch prior to stepping on it (Jt. App. 10). The branch on the walk was about fourteen inches long, round and as big around as appellant's finger, and was sort of dried up (Jt. App. 10, 30). The walkway in question is approximately four and one-half feet ( $4\frac{1}{2}'$ ) wide and thirty (30) feet long (Pl. Ex. 1). The walk was constructed of rough stone (Jt. App. 14). It had a general over-all pitch or slope downward in the direction in which appellant was walking at the time of the fall, of one-half inch in every foot (Pl. Ex. 1). At the place of the fall, there was no hand-rail or other safety device (Pl. Ex. 1, 2, and 3; Jt. App. 17-18). There were trees adjacent to the walkway, the branches of which extended near the walk in question (Pl. Ex. 2 and 3; Jt. App. 36).

It was the duty of appellees' maid to inspect the walk each morning between 7:00 and 7:30, to see if it needed sweeping (Jt. App. 35). As a matter of routine, the walk is swept only once a week (Jt. App. 35). The appellees do not know that the walk was swept on the morning of the accident (Jt. App. 35, 37-38); but, if it was so swept, it was between 8:00 and 8:30 a.m. (Jt. App. 35).

#### STATEMENT OF POINTS

The Court below erred by granting defendant's motion for a directed verdict, and in not permitting the jury to pass upon the factual question whether the defendants were negligent.

---

<sup>1</sup> Inasmuch as the testimony on this appeal revolves around the activities of Mrs. Quintina D'Ambrosio, alone, for the purposes of simplicity she will hereinafter be referred to as "appellant."

### SUMMARY OF ARGUMENT

1. While the standard required of the appellees toward appellant, who was a business invitee, was that of ordinary care in the maintenance of the entrance walk, under the facts of this case ordinary care required unusual precautions to keep the entrance-way safe for persons such as appellant who was accompanying a child in distress from appellees' medical treatment.

2. Appellees owed to appellant, a business invitee, the duty of inspection of the entrance way, from time to time, to keep it safe.

3. The evidence in this case must be considered in the light most favorable to appellant.

4. In the light of the foregoing principles, this case presented a factual issue whether appellees breached their duty in the above respects; and, therefore, the Judge erred in granting defendants' motion for a directed verdict at the close of plaintiffs' case.

### ARGUMENT

Appellant will show in this brief that there was sufficient evidence of appellees' negligence presented to the Court and jury below, to compel the submission of the case to the jury for its consideration. There are certain well-recognized principles of law which govern the disposition of a case of this type. These principles and their application to the case at bar will be discussed herein.

#### 1. Unusual Precautions Were Required of Appellees

It is of course recognized by all that appellees owed to appellant, a business invitee, the duty of exercising ordinary care to make the entrance- and exit-way to their offices safe for a person using ordinary care. *Hecht Company v. Harrison*, 78 App. D. C. 93, 137 Fed. (2d) 687; *Hellyer v. Sears Roebuck and Company*, 62 App. D. C. 318, 67



Fed. (2d) 584. The instant case, however, is or should have been a case for the application of another well-recognized rule. That rule, under the facts of this case, would dictate that ordinary care required unusual precautions to keep the entrance- and exit-way safe for persons such as appellant, who was accompanying a child in distress because of medical treatment just received at the hands of appellee. The case of *McKay v. Parkwood Owners, Inc.*, 78 App. D. C. 260, 139 Fed. (2d) 385, decided in 1943, is a case almost directly in point on this principle. That was a case where plaintiff fell on a freshly-waxed elevator floor as she was leaving a building largely occupied by doctors. A directed verdict for defendant was reversed by this Court. This Court held:

“In a building occupied largely by doctors, ordinary care required unusual precautions to keep the elevator floors safe for infirm, sick and injured persons. There was sufficient evidence from which the jury could have found that the defendant failed to use such care.”

The only difference between the *Parkwood case* and the case at bar is that here the appellant was accompanying a patient. In the *Parkwood case*, the plaintiff was a patient herself. As one of the appellees was a pediatrician, it is certainly reasonable to expect that a child of the age of seven should be accompanied by parents or other escorts and that such accompanying persons would quite naturally have their attention directed toward their small charges, rather than directed to the dangerous condition of the walkway provided by the doctors.

It, therefore, may be concluded that while the standard required of the appellees toward appellant, who was a business invitee, was that of ordinary care in the maintenance of the entrance walk, under the facts of this case ordinary care required unusual precautions to keep the entrance-way safe for persons such as appellant who was accompanying a child in distress from appellees' medical treatment.



## 2. Appellees Owed a Duty of Inspection of the Walkway

The cases in the District of Columbia show that one who maintains a place of business to which the public is invited, has a duty to so inspect the premises as to disclose any hazards to safe use of the same by their invitees.

The leading and landmark case on this point is *Market Company v. Clagett*, 19 App. D. C. 12. In that case plaintiff was injured when she fell on a fish which was then lying on the floor of the Washington Market. The Market Company defended on the ground that there was no proof of actual or constructive notice of the presence of the fish on the part of the defendant. There was proof in the case that the Market Company provided a watch force whose duty it was to patrol the aisles and remove or report obstacles to safe passage. This Court held that the question of notice was not material and sustained plaintiff's jury verdict saying:

"\* \* \* having the means of knowledge and negligently remaining ignorant, is equivalent, in creating a liability, to actual knowledge. This is the principle laid down in the House of Lords, upon great consideration, in the case of the *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687, 701, which has been quoted with approval by the Supreme Court, in the case to which we have already referred, of *Bennett v. Railroad Company*, supra, (102 U.S. 577, 582). \* \* \* the jury must have found that the Market Company had failed to provide a sufficient force to patrol and keep the aisles and corridors of the building clear and in a safe condition. And, upon that supposition, the question of notice would in any aspect of the case, become quite immaterial."

This principle was reiterated in the case of *Hellyer v. Sears Roebuck & Company*, supra, where there was a fall upon the public stairway. This Court held:

"Appellant was an invitee, and, as such, appellee owed her the duty of exercising ordinary care to so construct the stairways as to make them safe for a

person using ordinary care for his own safety, and lessees owed the duty of inspecting them from time to time to keep them safe." (Emphasis supplied) 67 Fed. (2d) 584.

Appellees argued below successfully, and will argue here, that they did not know of the presence of the branch on the sidewalk.<sup>2</sup> To hold that a party who remains ignorant of the condition of his own premises, by failing to make reasonable inspections of the same, is entitled to rely on this lack of knowledge of the dangerous condition and thus escape liability, is to reward indifference. Appellees here bottom absence of liability on their ignorance of their own premises. Appellees should not be rewarded nor should plaintiff suffer because of appellees own unconcern. Neither logic nor law warrants such a conclusion.

It, therefore, may be concluded that appellees owed to appellant, a business invitee, the duty of inspection of the entrance way, from time to time, to keep it safe.

### **3. Evidence Must Be Viewed Most Favorably to Appellant**

It is unnecessary to dwell at any length on the point that in a case of this type the evidence must be considered in the light most favorable to appellant. The case of *Peigh et al v. Baltimore and Ohio Railroad Company*, decided by this Court on April 9, 1953, is the last of a long line of cases to this effect.

### **4. The Facts of this Case Warranted Submission of the Same to the Jury**

#### **a. Appellees Breached Their Duty of Ordinary Care**

The record shows that appellees had exclusive power of maintenance and control over this exit walk (Jt. App. 33, 36-37). This walk was used and intended to be used almost exclusively by patients, including children and those

<sup>2</sup> It should be noted that they can not deny the absence of safety devices or the slope in the sidewalk, inasmuch as these were matters of long standing and completely within their control (Jt. App. 33, 36-37)



accompanying sick and infirm individuals. Notwithstanding this, the evidence showed the walkway was constructed of rough stone and had a slope downward, which slope might reasonably have caused the rolling movement of the branch which was allowed to fall on and remain on the walk prior to the accident. This sliding of the branch on the slope caused the fall (Jt. App. 21, 27). It might reasonably be inferred that the branch itself fell from the nearby trees, whose branches were close the walk. These were appellees' trees (Jt. App. 36). Though the branch fell on the walk on September 6, 1949, a time when the branches ordinarily bear leaves, the particular branch which caused the fall appeared dead and had no leaves. From this, it might reasonably be inferred that it was a branch which reasonably prudent persons, under the circumstances, would have removed from the premises before it fell on the walk and caused an unsafe condition. There was no handrail or other safety device for the safety of patients or escorts, to help prevent just what happened.

These facts and the legitimate inferences to be drawn therefrom certainly presented a factual issue as to whether appellees took the unusual precautions required to prevent the serious injury which appellant suffered.

**b. There Was a Failure on Appellees' Part Adequately to Inspect the Walkway**

The facts and evidence by testimony of both appellees show that the walk was swept routinely only once a week (Jt. App. 35); the maid had a duty to inspect the walkway each morning between 7:00 and 7:30 o'clock (Jt. App. 35); appellees did not know whether the walk was swept on the morning in question; but if it was swept it would have been no later than 8:30 a.m. (Jt. App. 35, 37-38). As the fall occurred at approximately 2:30 p.m., there was a minimum of six hours when there was no inspection. Whether this conduct was reasonable under the circumstances of this case was certainly a factual question for the jury and did not present only a question of law.



A pertinent case on this point is *Sears Roebuck and Company v. Patterson*, 76 Fed. (2d) 243 C.C.A. 8, 1935. Plaintiff, in that case, fell on twine which it was supposed, but not proved, came from wrappings on merchandise sold by defendant. In that case, defendant argued that his duty was discharged when he cleaned his store each morning. The Court properly held:

“That it was customary to clean the place every morning was again the statement of a practice. The duty of defendant with reference to the safety of these premises, however, was a continuing one, and was not necessarily discharged by a single act of ‘cleaning every morning.’ If, during the day, the premises became unsafe for the use of customers, they could not properly be left in such condition until the morning cleaning process might again place them in a safe condition.” 76 Fed. (2d) 247.

Here, as in the *Patterson* case, a jury question was presented.

#### CONCLUSION

This case demonstrates the wisdom of this Court’s admonition in the case of *Peigh et al v. Baltimore and Ohio Railroad Company*, decided April 9, 1953, when it stated:

“\* \* \* we think it well to add that in a case of this kind, if there is room for a difference of opinion, the wise course is for the trial judge to allow the case to go to the jury. If a verdict is deemed by the Court to be contrary to the evidence, judgment may be entered *nonobstante veredicto*. Actions by this Court in the event of an appeal from such a judgment would not entail the trouble and expense of a new trial.”

Under the facts and peculiar circumstances of this case, appellants submits that there was sufficient evidence of negligence on the part of appellees to take the case to the

jury and that this cause should be reversed with directions for a new trial.

Respectfully submitted,

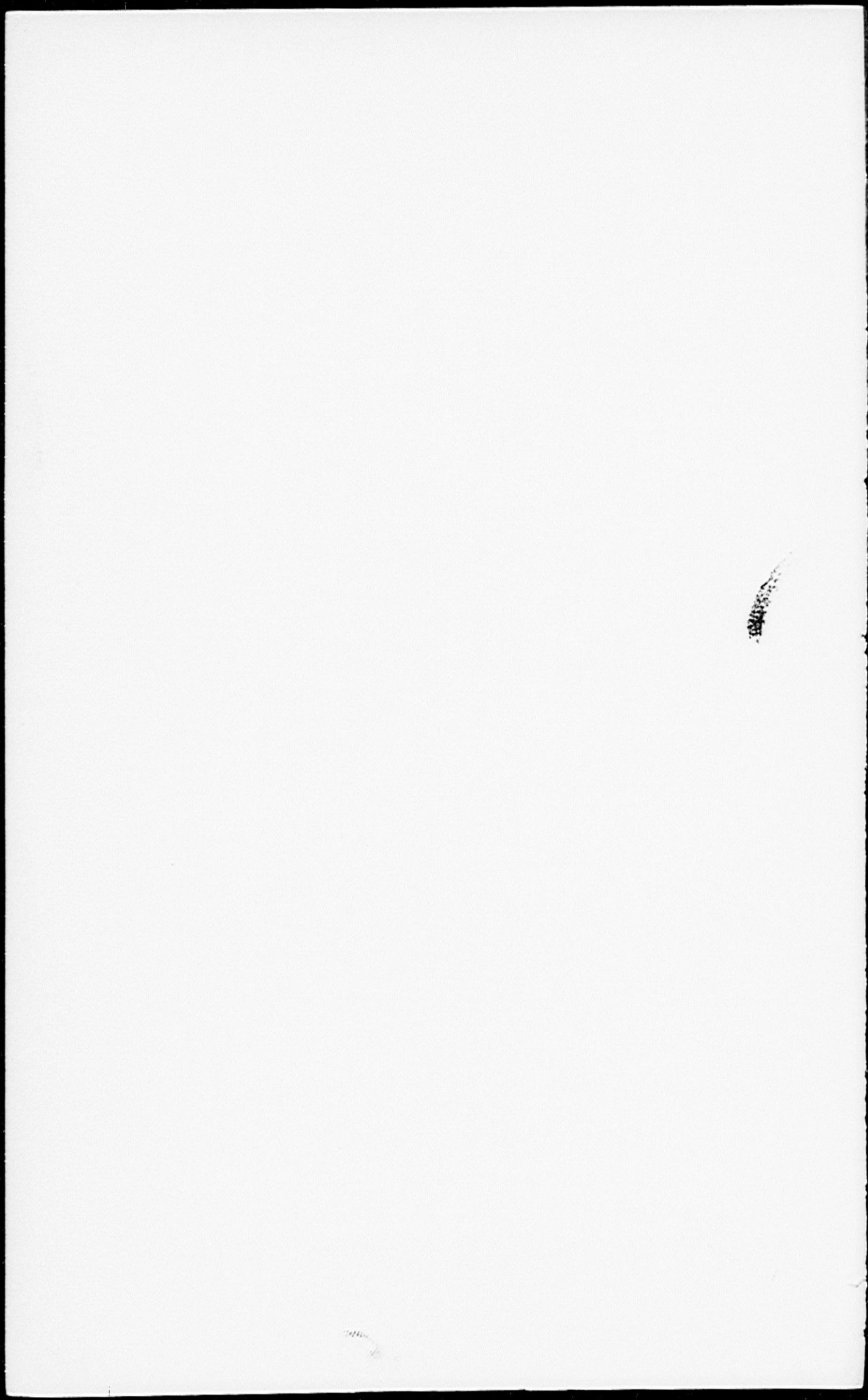
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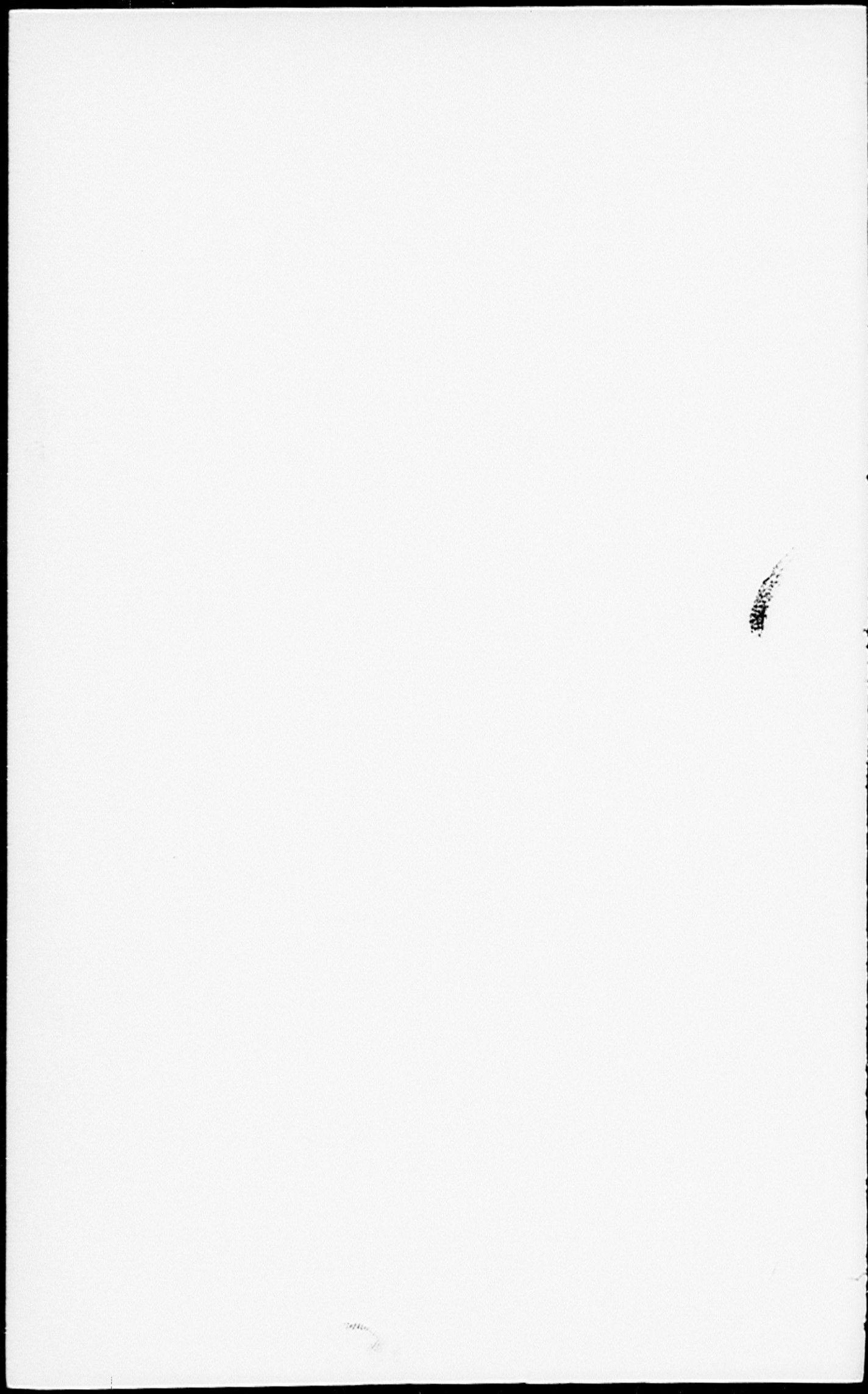
# **APPENDIX**





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## JOINT APPENDIX

### I.

#### PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

92

Filed Apr 1, 1952

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

QUINTINA D'AMBROSIO, and FRED G. D'AMBROSIO, *Plaintiffs*,  
v.

DR. CAROLYN S. PINCOCK, and DR. GLEN PINCOCK,  
*Defendants.*

#### **Amended Complaint for Personal Injuries**

(Fall upon Side-walk on Defendants' Premises)

1. The claims for relief herein on behalf of the plaintiffs, Quintina D'Ambrosio and Fred G. D'Ambrosio, against the defendants, Carolyn S. Pincock and Glen Pincock, are for amounts in excess of Three Thousand Dollars (\$3,000-.00), and are within the jurisdiction of this Court.

2. On or about September 6, 1949, the plaintiff Quintina D'Ambrosio was an invitee upon the premises maintained by the defendants at 4000 Sixteenth Street, Northwest, for their professional offices, the plaintiff having had an engagement on the date alleged, with defendant, Dr. Carolyn S. Pincock, a pediatrician, who was to examine and administer to the infant daughter of the plaintiffs.

3. After consulting the defendant, Carolyn S. Pincock, and while still upon the premises, the plaintiff Quintina D'Ambrosio was injured because of the negligence and carelessness of the defendants herein.

(a) The defendants carelessly and negligently allowed to accumulate and remain upon the walk, leading from the

front steps of the premises aforesaid, to the municipal sidewalk in front of the premises, branches and twigs which had blown or fallen from trees upon the premises, and which rendered the footing upon the walk upon their premises, unsafe and dangerous. Plaintiff Quintina D'Ambrosio slipped upon a branch lying upon the sidewalk and fell. Defendants knew, or reasonably should have known, of the existence of the foreign material on their sidewalk, or had the means of knowledge and negligently remained ignorant.

93 (b) Defendants' carelessly and negligently allowed a dead branch or twig to remain on a tree overhanging the sidewalk leading from the front steps of the premises aforesaid to the municipal sidewalk, so that the same fell to the sidewalk upon their premises and there remained until plaintiff slipped upon same and fell while leaving the defendants' place of business and suffered the injuries hereinafter stated.

(c) The carelessness and negligence described in subparagraph (a) and/or (b), when combined with the negligence and carelessness of defendant in constructing, providing and maintaining a dangerous sidewalk upon their premises, which sidewalk was not level but sloped downward from the business entrance to the municipal sidewalk, caused plaintiff to slip and fall, suffering the injuries as hereinafter stated.

4. In the fall aforesaid the plaintiff, Quintina D'Ambrosio, sustained a torn internal and external ligament of the left ankle, with a severe strain thereof with hematoma formation. She also suffered an injury to her spine, to wit, a ruptured intervertebral disc, right. On, to wit, February 14, 1951, plaintiff, Quintina D'Ambrosio, entered Providence Hospital where a ruptured intervertebral disc was removed from between the fifth lumbar and first sacral vertebra and a spinal fusion performed. Plaintiff remained in Providence Hospital until, to wit, March 26, 1951. Since



her discharge from the Hospital plaintiff has been obliged to wear a back support and suffered constant pain and discomfort. Among the other things the injury complained of above activated a pre-existing arthritis of the spine. The plaintiff has a marked restriction of motion in her back which is permanent in nature. In addition to the injuries to her back complained of above the plaintiff suffers constant pain in her left leg and the damage thereto is permanent.

5. Plaintiff has expended substantial sums of money in an effort to be cured of her injury aforesaid and will in the future be obliged to spend further substantial sums of money for the same purpose.

6. Wherefore, the plaintiff, Quintina D'Ambrosio, claims of the defendants the sum of Fifty Thousand Dollars (\$50,000.00), plus costs and interest.

94 7. The plaintiff, Fred G. D'Ambrosio, is the husband of Quintina D'Ambrosio and, as a result of the injuries to his wife aforesaid, he has been put to considerable expense for doctors and other bills and has lost the services and consortium of his wife, all to his damage in the amount of Twenty-five Thousand Dollars (\$25,000.00), besides costs and interest.

BERNARD J. GALLAGHER  
Bernard J. Gallagher

J. ROY THOMPSON, JR.  
J. Roy Thompson, Jr.  
525 Union Trust Building,  
740 Fifteenth Street, Northwest,  
Washington 5, D. C.

(Metropolitan 4367)

*Attorneys for Plaintiffs*

### Demand for a Jury Trial

The plaintiffs herein demand a jury trial upon all the issues in this case.

BERNARD J. GALLAGHER

Bernard J. Gallagher

\* \* \* \* \*

95

Filed Apr 11 1952

### Answer to Amended Complaint

#### FIRST DEFENSE

The defendants admit the allegations contained in paragraph one of the Complaint. As to paragraph two, they admit that the plaintiff was injured on or about September 6, 1949, and they further admit that the plaintiff was in the office of the defendants on that day, but they deny each and every other allegation of negligence contained in the Complaint and in particular they deny all of the allegations in paragraph three and subdivisions (a), (b) and (c). As to paragraphs four and five, the defendants state that they are without information or belief sufficient to either admit or deny the allegation with respect to the personal injuries, expenses and financial losses alleged to have been sustained by the plaintiffs. As to paragraph seven, defendants state that they do not have information or belief sufficient to either admit or deny the allegations, but demand strict proof thereof.

#### SECOND DEFENSE

Further answering the Complaint, the defendants state that the accident which the defendants complained of was contributed to by the negligence of the plaintiff and consequently they cannot recover in this action.

JOHN F. COONEY

John F. Cooney

*Attorney for Defendants*

1025 Vermont Avenue, N. W.

\* \* \* \* \*



100

Filed Oct 17 1952

**Motion for New Trial**

Now comes the plaintiffs, through their attorneys, and move this Court to grant a new trial of the above-captioned case on the following grounds:

(1) The granting of defendants' Motion for a directed verdict at the close of plaintiffs' case was contrary to the law and the evidence, and

(2) Newly-discovered material evidence which could not have been discovered prior to trial by exercise of reasonable diligence on the part of plaintiffs' attorneys, indicates that a new trial should be granted. An affidavit in support of the newly-discovered evidence is attached hereto and made a part hereof.

A Memorandum of Points and Authorities in Support of this Motion is attached hereto and made a part hereof by reference.

BERNARD J. GALLAGHER  
Bernard J. Gallagher

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740 Fifteenth Street, N. W.  
Washington 5, D. C. (ME-4367)  
*Attorneys for Plaintiffs*

\* \* \* \* \*

108

Filed Oct 31 1952

**Order Overruling Motion for New Trial**

Upon the coming on for hearing of the motion filed herein by Plaintiffs, for a new trial, it is this 31 day of October,



1952, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL,  
*Clerk,*

By JOHN J. FLANNERY,  
*Deputy Clerk.*

By direction of  
Judge EDWARD A. TAMM  
N/

\* \* \* \* \*

109 Filed Dec 1 1952

**Notice of Appeal**

Notice is hereby given this 1st day of December, 1952, that Quintina D'Ambrosio and Fred G. D'Ambrosio, plaintiffs, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 8th day of October, 1952 in favor of Carolyn S. Pincock and Glen Pincock, defendants against said plaintiffs.

BERNARD J. GALLAGHER  
J. ROY THOMPSON, JR.  
*Attorneys for Plaintiffs*

\* \* \* \* \*

**II.**

**EXCERPTS FROM TESTIMONY AND PROCEEDINGS**

3 PROCEEDINGS

\* \* \* \* \*

Mr. Gallagher: Your Honor, I would like to offer in evidence now as Plaintiffs' Exhibit 1 the chart of the entrance walk and steps of the Pincock address which was prepared, as I understand it, by someone from the Building Inspectors' office and it was marked at pretrial.

\* \* \* \* \*

Mr. Cooney: As I understand that, this is being introduced into evidence to show the condition of the sidewalk as of the time the chart was made.

\* \* \* \* \*

The Court: It will be admitted as Plaintiffs' Exhibit No. 1.

\* \* \* \* \*

4 Mr. Gallagher: I would like a stipulation, too, that it also represents the condition of the walk at the time in the fall of 1949 as to the pitch in the walk, and so on.

The Court: Do you so stipulate, Mr. Cooney?

Mr. Cooney: I so stipulate.

\* \* \* \* \*

**Quintina D'Ambrosia.**

one of the plaintiffs herein, was called as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr Gallagher:

\* \* \* \* \*

6 Q. Mrs. D'Ambrosia, we are inquiring here about an accident that occurred on September 6, 1949. It is agreed in the defendants' answer that the accident did happen on that date. The accident occurred at 4000 16th Street, Northwest, which were the premises upon which Dr. Carolyn and Dr. Glen Pincock conducted a medical practice? A. Yes.

Q. You were there on that day? A. Yes.

Q. What was the occasion for your going there?

7 A. I went there for my little girl to take an annual checkup and she was to receive a booster shot which she did.



Q. At what time of the day did you go there? A. I arrived there between 1:30 and quarter to two.

Q. The physician that you were calling on was Dr. Carolyn Pincock? A. Yes.

Q. She is the pediatrician? A. Yes.

Q. She had treated your child before this particular time, hadn't she? A. Yes.

Q. For how long? A. Since she was ten weeks old.

Q. From the time she was a baby until she was seven?  
A. Until that date.

\* \* \* \* \*  
Q. You had been to these premises before that, I take it?  
A. Yes.

Q. You arrived there between 1:30 and quarter of two?  
A. Yes.

8 Q. Did you see Dr. Carolyn Pincock immediately?  
A. No; I had to wait for my appointment.

Q. What time was your appointment? A. It was between 2 and 2:30, if I remember correctly.

Q. Do you recall about what time you actually did see Dr. Carolyn Pincock? A. I believe it must have been after two o'clock.

Q. How long were you with her in the course of this examination and the receiving of the booster shot? A. Oh, I guess I would say on the average of 20 to 25 minutes.

\* \* \* \* \*  
Q. What did she do for the child? A. She asked me when was the last booster shot and she had the charts there showing it. I told her, because of the examinations for school and before she got into school she would have to have the booster shots and our time had expired so we were there.

Q. Did you see the booster shot administered? A. Yes.

Q. How was it done? A. With a needle.

\* \* \* \* \*



9 Q. What immediate effect did the administering of the shot have on the child? A. Well, just like any other child; she started hollering and crying and got all excited.

Q. You remained with Dr. Carolyn Pincock, you think, about 20 minutes? A. That is right.

\* \* \* \* \*

Q. What time did you leave the building and start out toward the street? A. I left that building to come on the outside about 20 minutes to three or quarter of three when I got on the outside.

10 Q. As you left the building, were you carrying anything in your hand or your arm? A. Yes.

Q. What? A. I was carrying two umbrellas in my right arm and my pocketbook. One umbrella belonged to my little girl and one was mine. I was holding her by the left hand and we came out the doorway of the doctors' office.

Q. Was she still upset from the shot? A. Yes; she was still sort of crying and said it hurt.

Q. Was that true as you were leaving the front door of the doctors' offices? A. As we were coming out the door.

Q. Had Dr. Carolyn Pincock given the child anything after the shot? A. Yes, she gave her a lollypop.

Q. Did she say why? A. She said she could eat it and that it usually calmed children down.

Q. As you left the door of the doctors' office, you say you were carrying in your hand two umbrellas, yours and your child's and your purse? A. Yes.

Q. And leading the child with your left hand? A. Yes.

11 Q. What was the occasion for carrying umbrellas that day? A. Well, when we left home, it was sort of cloudy and I was afraid of rain and I didn't want to get caught in the rain and get too wet so we took the umbrellas and we went on to the doctors' office.

Q. Generally, what was the weather at the time when you left the doctors' office? A. Well, it was sort of cloudy,

a little breezy, a little wind stirring up. It looked like it was getting ready for a fall rain. It was in the month of September. It looked like a little shower we were due for.

Q. Tell us what happened after you left the doctors' office with respect now to the steps and the front walk.

\* \* \* \* \*

A. Well, I had my little girl by the hand and we were coming down the steps. As we started down the 12 steps I said to her—

\* \* \* \* \*

We walked down five or six steps. We came down another step. We walked a distance, about five feet but before I got through to come down—I was holding her—and I slipped and, as I slipped, I fell forward with an impact to the right. My little girl was still holding my hand trying to pick me up but I had already scuffed the ground and I was so shocked and in a daze I could hardly move to get up.

\* \* \* \* \*

13 Q. Just a moment. You said you slipped. You said you fell. What did you slip on? A. I slipped and fell on a tree twig.

\* \* \* \* \*

Q. Can you describe this tree twig you fell on? A. Well, it was about 12 or 14 inches long, big around as my finger and sort of dried up.

Q. Did you see it before you stepped on it? A. No, I didn't.

Q. Mrs. D'Ambrosia, was this tree twig on which you stepped on the sidewalk? A. Sir?

Q. Was the twig on the sidewalk? A. On this walk of the steps before I went down.

\* \* \* \* \*

17 Mr. Gallagher: Your Honor, we would like to offer in evidence now two photographs as Plaintiffs' Exhibits 2 and 3 which were marked at pretrial.



The Court: The Court will admit these exhibits in evidence.

(Plaintiffs' Exhibits 2 and 3 were received in evidence.)

The Court: The Court has been advised at a bench conference that these photographs of the defendants' residence were taken in March of 1952.

The Court must point out to the ladies and gentlemen of the jury that this accident occurred on September 6, 1949. There are, in the pictures that the Court is admitting in evidence, some branches of a tree showing in the left-hand side of the picture. The Court cautions the ladies and gentlemen of the jury that you should not draw any conclusions from these photographs as to the condition of the tree that adjoined or was near the walk on September 6, 1949 from these photographs. Obviously, the photograph of the tree taken in March would look substantially different than a photograph taken of a tree in September of 1949.

Also, since three years elapsed between the happening of the accident and the date of these photographs, the tree would have grown substantially, the branches would  
18 be probably longer, higher, and so on, so that you should not draw any conclusions with reference to the tree or branches from these photographs which the Court is admitting in evidence solely for the purpose of showing you the steps and the walk where the plaintiff says this accident occurred.

You may proceed.

\* \* \* \* \*

Q. Mrs. D'Ambrosia, I show you Plaintiffs' Exhibit No. 2. As I recall your testimony, you said you were proceeding down that walkway toward the street when you fell on this twig. On which of those elevations did the fall occur? A. On this middle step (indicating).

\* \* \* \* \*



19 Q. Mark on the step where the fall occurred, and mark it also on Plaintiffs' Exhibit 3.

You have marked on each of these exhibits, with a small "x" in ink, the spot where you fell? A. That is right.

\* \* \* \* \*

20 Q. Incidentally, what type of shoe were you wearing at that time? A. At that time I was wearing a dress shoe, a black patent leather with a single strap.

Q. What type of heel? A. I had a regular dress shoe heel; a little higher than the ordinary walking shoe.

\* \* \* \* \*

Q. Was that type of heel which you were accustomed to wearing? A. Yes. When I dressed I wore a dressier shoe always.

Q. Did the heel that you were wearing on that day have anything to do with your fall?

\* \* \* \* \*

21 The Witness: No.

\* \* \* \* \*

22 A. Yes. I told her I fell out front on her steps on a tree twig; that I had slipped on my way going down and that a man brought me back in the office and I waited and she came to me and the nurse and they administered this ice pack.

\* \* \* \* \*

Of course, I let it go at that and then Dr. Glen Pincock came in the office later on and he asked me what happened, and I said, "Well, I fell out front on your steps. I slipped on a tree twig out there and this is what I got," so he called it the same thing that Dr. Carolyn called it.

\* \* \* \* \*

23 Then my little girl and I started walking out of the office and got out front and as we got out front the

same man was coming in the office who helped me about an hour or so earlier and he said, "Is that what you did?"

\* \* \* \* \*

25 Q. Incidentally, what day of the week was it when this accident occurred? A. I fell on Tuesday afternoon.

Q. Tuesday afternoon, September 6th? A. That is right.

\* \* \* \* \*

27 Cross Examination

By Mr. Cooney:

\* \* \* \* \*

28 Q. Mrs. D'Ambrosia, you are friendly with Dr. and Mrs. Pincock, are you not? A. As doctors, yes.

Q. Beg pardon? A. As doctors, yes.

Q. And when your daughter was born, after the first ten weeks, you took your daughter to Dr. Carolyn Pincock, did you not? A. Yes.

Q. And up until the time of this accident, Dr. Carolyn Pincock still treated your daughter, did she not? A. Yes.

Q. Has she treated your daughter since this accident? A. No.

Q. And after the accident, you had Dr. Glen Pincock treat you, isn't that correct? A. Yes.

Q. Do you and your husband own an automobile? A. Sir?

Q. Do you or your husband own an automobile? A. My husband has a car.

Q. He does have one? A. Yes.

Q. How long have you had that automobile? A. Since November 19, 1949.

Q. And that was after the accident is that right? A. Yes.

Q. And he did not own one prior to the accident? A. No, he didn't have one.

Q. And you didn't go for any long automobile rides prior to the accident, did you? A. Yes.



Q. Were you involved in any automobile accident prior to this accident? A. No, sir, never.

Q. Have you ever been involved in an automobile accident? A. No, sir.

Q. Recalling the date of this accident, September 6th 1949, I understand that you took your daughter to  
30 Dr. Carolyn Pincock's office about 1:30 in the afternoon. A. Yes.

Q. Your appointment was at two, is that right? A. I don't remember the exact time.

Q. Two or two thirty? A. Two or two thirty.

Q. Can you tell me approximately how many times you have gone to Dr. Pincock's office? A. No, I couldn't give you an approximate number of times.

Q. Approximately what? A. No, I couldn't give you the amount of the times.

Q. You had been going there for seven years, had you not? A. Yes.

Q. And you were very familiar with the Doctors' sidewalk and the steps? A. Just from going there.

Q. Did you ever fall on them before? A. No, sir.

Q. Did you think they were dangerous steps? A. Well, just like any other steps, accidents will happen.

Q. Just like any other steps, is that right? A. Yes.

31 Q. What was the other remark you made? A. Accidents can happen.

Q. But there is nothing unusual about these steps or sidewalk, was there? A. They were a rough type of stones that you could probably get your feet or heels caught in. Some pieces of stone were lower than others.

Q. Rough, you say? A. Rough stones.

Q. So you might catch your heel in them. Is that what you state? A. Yes.

Q. Would you say that these steps are slippery?

The Court: "Are" or "were"?



By Mr. Cooney:

Q. Were at the time of this accident? A. I didn't take notice.

Q. I beg your pardon? A. I didn't take notice whether they were slippery or not. I just walked.

Q. I am asking you were they slippery? A. No.

Q. Do you know what they are made of? A. All I know is they are made of stone.

Q. Would you say they are made of cement? A. I  
32 don't know what it is. Stone is all I know them as.

Q. But they were rough? A. Yes.

\* \* \* \* \*  
"Question: What is the composition of these steps; cement, flagstone, cobblestone, concrete or what?

"Answer: I know they are stone. That is about all I can say. They are stone steps. They were not wood.

"Question: Were they like the same kind of material that the sidewalk is made of on 16th Street in front of the residence?

"Answer: I think it was smooth steps. The little steps that come out are not as rough."

Is that correct? Did you state in your deposition that the steps were smooth? A. May I ask a question—which steps are you referring to? There are two flights. I referred to the first ones that seemed smoother than the sidewalk three steps which were rough and which I fell on. The

33 five or six steps coming out, I thought they were smoother. Of course, I didn't go back to look and that is just my recollection of the steps.

Q. The ones that you fell on were rough but the others were smooth? A. Rough stone.

Q. Is that correct? A. Yes.

Q. Aren't they all made of the same kind of stone? A. I don't recall what those others are made of. They were stone. I know they were not wood. Those five or six, I know they were not wood.

Q. As you walked into the doctors' house that afternoon, tell us what the weather conditions were. A. On my way going in?

Q. That is right. A. It looked cloudy. It was a little windy. It was a breezy fall day and it looked like we were going to have rain when I went in the office.

Q. Was it an unusually windy day? A. Not an unusually windy day for that time of year.

Q. Was there enough wind to blow the leaves around, would you say? A. Yes, there was enough to carry the leaves around.

Q. It was? A. Yes.

34 Did you notice anything on the sidewalk at all leading from the main sidewalk on 16th Street up to the doctors' door? A. I didn't take notice of anything.

Q. You didn't see any branches of a tree? A. Well, I wasn't looking for branches. I was walking slowly to get in the office.

Mr. Cooney: I would like to have the question answered, Your Honor. I asked her if she saw any branches of the tree.

The Court: Repeat your question to the witness, Mr. Cooney.

By Mr. Cooney:

Q. Did you see any branches or twigs on the sidewalk as you entered the office? A. My answer is—did I take notice? I wasn't looking. I don't remember whether there was any there or wasn't there.

Q. Did you see any other debris of any kind on the sidewalk? A. I didn't notice. I wasn't looking.

Q. Would you say that the sidewalk was clean when you went in? A. I don't know. I was just walking like on any sidewalk.

35 Q. You wouldn't say there was anything on the sidewalk though, would you? A. I don't know. Going in, I was walking.



Q. How long were you in the doctors' office? A. Well, I got in there about 1:30 or quarter of two for the appointment. I had to wait and I was coming out of that office about twenty minutes of three or quarter of three when I fell. That is about the length of time I was in the office.

Q. Can we safely say you were in the doctors' office approximately one hour? A. About an hour and fifteen minutes.

Q. As you came out of the office, I believe you testified that you had your little girl with you. A. Yes, sir.

Q. And you had hold of her hand with your left hand? A. Yes, sir.

Q. Leaving the doctors' office, you have a series of five steps, is that correct, going down to the main sidewalk?

A. Well, I didn't know whether it was five or six.

Q. I will show you Plaintiffs' Exhibit No. 1, I believe. A. These?

Q. Yes, those (indicating).

The Court: That is Plaintiffs' Exhibit No. 2 or 3?

Mr. Cooney: No. 2, Your Honor.

The Court: Very well.

36 By Mr Cooney:

Q. And there are five steps are there? There is a rail on each side of these steps, is there not, coming down?

A. At that time, they had two at the top.

Q. Railing? A. Railing at the top step.

Q. From the top step to the bottom? A. No, I don't think she had a railing all the way down. She had a top railing.

Q. Then this picture doesn't represent the true situation? A. Let me look at that again.

Q. Showing you Plaintiffs' Exhibit No. 2. A. These were not there (indicating), if I remember correctly, at that time; just this side and this side (indicating) was there. If I remember correctly these are the two big rails that I remember up there.



Q. The railings were not there, according to your recollection? A. Not these (indicating). That is my recollection, they were not there.

Mr. Gallagher: Mrs. D'Ambrosia, I can't hear you.

The Witness: The railings, to my recollection, were not going down. They had two on the side up at the top.

By Mr Cooney:

37 Q. As you came out of the office, you started to walk down those five steps, is that correct? A. Yes.

Q. And you walked down the five steps? A. Yes.

Q. You had hold of your little daughter with your left hand? A. Yes.

Q. And you had two umbrellas? A. Yes.

Q. Where did you have the umbrellas? A. I had two umbrellas under my arm, with the purse on my arm.

Q. Let's talk about the umbrellas. A. The two umbrellas were under my arm.

Q. Which arm? A. Under my right arm.

Q. And in your hand you had a pocketbook, is that correct? A. Yes.

Q. What difference, if any was there in the weather as you came out of the doctors' office compared with when you went in? A. It was still the same. It was cloudy. It looked like it was going to get ready for rain and there was  
38 a breeze blowing. It looked like it was getting ready to rain.

Q. It was practically the same, is that correct? A. Just about the same.

Q. As you started to walk down the first platform, you came to one step down, is that correct? A. You mean I walked one step down and got on a walk?

Q. Right. A. Yes.

Q. Then you walked about five feet further, is that correct? A. Yes.

Q. Until you came to the second step down? A. Yes.

Q. And that is where you fell? A. Yes.

Q. Did you look at the step as you stepped off of it? A. Did I look?

Q. That is right, look down. A. No, I was walking.

Q. Looking straight ahead? A. Walking.

Q. You didn't look down at all? A. Not at that time.

Q. What kind of shoes did you have on that day? A. Black patent sandals, strap.

39 Q. Dress shoes? A. Dress shoes.

Q. That is a high heel, is it not? A. Higher than the ordinary walking shoe but not a spike heel.

Q. I don't know the difference between the spike heel and a high heel. Can you give us some idea with your fingers how high the heel was? A. I had a dress shoe heel about that high (indicating).

Q. About that high. A. Spikes are like that (indicating).

Q. The heels on your shoes—do it again, please. A. Spikes are like that (indicating).

Q. Not the shoes like that. A. The shoes I was wearing, the heels were about like that (indicating).

Mr. Cooney: Indicating two-inch heels, Mr. Gallagher, would you say?

Mr. Gallagher: I would say less than that, Your Honor.

Mr. Cooney: How high would you judge the heels of your shoes were?

The Court: Just hold your hand up and show how high they were.

The Witness: Like that (indicating), a dress shoe.

By Mr. Cooney:

40 How high is that, to your best judgment. A. Two and a quarter.

Q. Two and a quarter? A. Two inches.

Q. Was this the first time you had worn those shoes? A. No, sir.

Q. They were new shoes, weren't they? A. It wasn't the first time I had worn them.



Q. How many times had you worn them before that?  
A. I had worn them quite a bit.

Q. How many times? A. From Easter; April of that year until then; April, May, June, July, August, five months.

\* \* \* \* \*

42 Q. Let's go back to the actual fall. Will you tell us again just exactly what happened, your best recollection; how you happened to fall? A. You want me to explain with my daughter with me?

Q. No. A. You don't want that explanation, then?

Q. I beg your pardon? A. You don't want that explanation. You just want to know when I got to the steps I fell. Is that right?

Q. That is right. Now, we have come to where  
43 you have reached the second step down, is that right? A. Yes.

Q. And I show you Plaintiffs' Exhibit No. 3 where you have put a cross-mark. A. On the step.

Q. Which step? A. This step, the second step.

Q. Did you fall where that cross-mark is? A. Yes. I was walking down here (indicating) and I slipped and I went forward all the way down to this sidewalk—forward.

Q. You have put a mark on Plaintiffs' for identification No. 3. How far is that mark, would you say, from that step? A. I don't know just what you mean by that.

Q. Did you fall on the step or back of the step? A. I slipped on the tree twig and rolled down a slope like and went forward and I hit forward on this next sidewalk.

Q. Where was this twig of a tree? A. This twig of a tree was under the foot, the left heel.

\* \* \* \* \*

Q. I mean where was the twig on the sidewalk? A. I didn't see it before I fell.

44 Q. Then you didn't fall on that step, is that right? You slipped back of the step? A. I slipped forward and came forward.



Mr. Cooney: Your Honor, I don't think that is a very difficult question I have asked her and I think I am entitled to an answer.

The Court: Ask your question.

By Mr. Cooney:

Q. Did you fall on the step or did you fall back of the step?

Mr. Gallagher: May I suggest, Your Honor, I am not certain that she understands the question.

The Court: What do you mean by 'back'?

Mr. Cooney: We have a step where you step down. Did she fall before she reached that step.

The Court: State the question to the witness that way.

By Mr. Cooney:

Q. Did you fall before you reached that step down or did you fall as you reached the step that was going down?

A. The actual fall came as I was coming over. I slipped forward coming down the step.

Q. Coming down the step? A. I slipped over the tree twig.

Q. Did the heel of your shoe hook on that step  
45 down, as you stepped down? A. After the fall forward—

Q. No. A. It got stuck.

Q. When you fell? A. Yes; it got stuck after the fall forward.

Q. Before you fell to the ground, did your heel get hooked on that step? A. It happened so sudden—

\* \* \* \* \*

The Witness: I slipped on a tree twig and fell forward and, as I fell forward, sort of crushing on the ground my foot gradually—it was still hooked and I went on that heel—slid about five more inches and it got stuck on that edge there because I continued to go on a slide; just like I was going down a little hill and that is how my foot gradu-

ally continued to hang on there or I would have banged my face going forward and the tree twig was lodged there this distance until I hit the ground. That is the best way I can explain it, the way I feel.

\* \* \* \* \*

46 Q. Did you see this twig before you fell? A. No, I didn't.

Q. How do you know you slipped on the twig? A. How do I know it?

Q. Yes. A. Because I was slipping and I started to raise the right foot to go forward and put it in space and I fell and the twig was there. When the man helped to pick me up, I was all crippled up, still hanging on, and I looked and pulled my foot down and we pulled the tree twig from under the shoe that was there.

Q. You don't know where the twig was when you fell, do you? A. In that space, no.

Q. And you don't whether the twig got into the heel of your shoe after you fell or before you fell, do you? A. Well, I slipped on the twig.

Q. Did you see it? A. No.

Q. Then how do you know you slipped on it? A. Because I could feel slipping forward when the right foot was to go on the next sidewalk as I was going down the step. I was slipping and I thought I was going—I was slipping, something under the left foot and then we took notice it was a tree twig.

47 Q. The heel of your shoe got caught on this step, didn't it? A. On the twig; with the twig.

Q. It didn't get caught on the step? A. It was the twig under the heel on the step.

Q. Mrs. D'Ambrosia, recalling your attention again to the testimony that you gave on May 10, 1950—page 14—in my office at which your attorney was present, did I ask you this question and did you give this answer?



“Question: Tell me exactly what happened from the time you left Dr. Pincock’s offices until the time that you fell.

“Answer: Well, after my little girl was examined by Dr. Pincock, well I took her as usual. She was on my left. I started walking out of the office”—

I will withdraw that. That isn’t what I wanted. It is at the bottom of page 14:

“Question: Did you walk down those five or six steps all right?

“Answer: Fine. Perfect.

“Question: You had no trouble on that?

“Answer: No.

“Question: Then you walked along and you came to another step and stepped down?

“Answer: That is right, the first step.”

48 It wasn’t the first step that you stepped down, was it, that you slipped on? A. No, I didn’t fall on the first step. That is the first step after the five or six steps.

Q. Then the testimony you gave in my office is not correct, is that correct? A. I said after the first step. After the first step then I started walking and then I fell.

Q. (Reading)—

“Question: Now, is that where you fell?

“Answer: That is where I fell.”

A. After the first step. That is what you should have had, after the first step was my statement; after the first step.

Q. Then we should have had it different in my office?

A. Whoever took the shorthand writing should have said “After the first step.”

The Court: Just a moment.



By Mr. Cooney:

Q. (Reading)—

“Question: And you fell on your right knee?

\* \* \* \* \*

49 “Question: You fell on your right knee?

“Answer: I was holding my girl with my left hand and I had two umbrellas and my pocketbook in my right arm and when I fell my left foot, the heel, got hooked on that step that was going down and I landed on my right arm.”

A. With the twig under that heel.

\* \* \* \* \*

Q. Did you so testify in answer to that question in my office as to the twig? A. Yes, the twig is what I slipped on.

\* \* \* \* \*

50 A. I don't recall the exact statement. There was a twig under there all the time that caused the slip and the fall.

\* \* \* \* \*

Q. The heel on your shoe became loosened, is that right? A. Yes.

Q. And when was the first time that you ever saw this twig that you talk about? A. After I had fallen and was trying to get up and I said to my little girl, I said, “Let go of me because I can't get up. I am stuck with something under my heel,” so I went forward again and the man helped to pick me up and my foot was like I said. The twig was under the heel which caused my shoe to stick to the step.

Q. Where was the twig when you first saw it? A. Under my heel on that step.

Q. Was the twig on the step when you first saw it or under your heel? A. The step was there and the heel was there. All I could say is the twig was on the step under

the heel in the same little section where my foot was.

51 Q. Was it stuck to your heel? A. It was on the ground and the heel was over it.

\* \* \* \* \*

53 Q. Mrs. D'Ambrosio, I show you Plaintiffs' Exhibits 2 and 3 and you will note that you have placed a cross-mark indicating that that was the place you fell, is that correct? A. Yes.

Q. Is that cross-mark on the first or second step after you leave the sixth step from the doctors' office? A. It is the second step.

Q. And that is where you fell, on the second step? A. On that second step.

54 Q. Mrs. D'Ambrosio, referring again to your testimony which was taken on May 10, 1950, on page 14 in the second paragraph, in which, in answer to a question of mine—the question was at the bottom of page 13, the question is this:

“Question: Tell me exactly what happened from the time that you left Dr. Pincock's office until the time that you fell.

“Answer: Well, after my little girl was examined by Dr. Pincock, well, I took her as usual. She was on my left. I started walking out of the office and I said to her from the very top step, I said, ‘Now, let's be careful of these steps.’ That was the first five or six steps coming down, I meant. All right. We walked along very slowly, hand in hand, and we came to the first step. We came to the first step and I said to her, ‘Wasn't it nice Dr. Pincock gave you that lollypop?’ He gave her candy. Just as I said that, I fell; she holding my left hand, and I went down on my right knee and my left foot hooked up on that first step.

“Question: Let me stop you right there. That is the first step?

“Answer: After those five or six steps.



"Question: The first step after the five or six?

"Answer: After the first step of the office.

"Question: Did you walk down those five or six steps all right?

55 "Answer: Fine, perfect.

"Question: You had no trouble on that?

"Answer: No.

"Question: Then you walked along and you came to another step and stepped down?

"Answer: That is right; the first step.

"Question: Now, is that where you fell?

"Answer: That is where I fell."

Are you sure, Mrs. D'Ambrosio, now of where you fell?

A. Yes, I am positive where I fell.

Q. Which is correct— A. After the first—

Q. Just one moment, please. I haven't finished the question yet.

Is the testimony that you gave on May 10th in my office, in which you stated, in the presence of your attorney, that you fell on the first step; is that correct, or is it your testimony in court that is correct, where you say now and where you put a mark, that you fell on the second step?

\* \* \* \* \*

56 Mr. Cooney: At the bottom of page 14:

"Question: Then you walked along and you came to another step and stepped down?

"Answer: That is right; the first step."

Is that correct?

The Witness: After the five or six, there was one step.

\* \* \* \* \*

By Mr. Cooney:

Q. Is that where you fell? A. After the first step is where I fell. I left the first step and then walked, after the first step.

\* \* \* \* \*



Q. Your testimony now is that you fell on the second step where you put the cross-mark? A. Yes, that is where I fell.

Q. Did your heel get caught on that step? A. After I slipped with the twig under it, I hooked up on that step and I went forward on the slope coming down pulling myself to try to get up. It hooked up on that twig.

57 Q. Mrs. D'Ambrosio, is it my understanding that your heel got hooked on that step after you had slipped?

\* \* \* \* \*

Q. Is that your testimony, that you slipped before you got to that step? A. I slipped on the twig and fell forward. When I fell forward, I tried to get up. I went down like a slope and I was down and my foot kept pulling and I didn't realize—

\* \* \* \* \*

The Witness: I slipped.

The Court: Before you got to the step?

The Witness: I was slipping.

\* \* \* \* \*

By Mr. Cooney:

58 Q. Again, on page 14, I ask you did you testify to this:

“Answer: Well, after my little girl was examined by Dr. Pincock—well, I took her as usual. She was on my left. I started walking out the office and I said to her from the very top step—I said, now, let's be careful of these steps. That was the first five or six coming down, I meant.

“All right, we walked along very slowly here and hand in hand, we came to the first steps. We came to  
59 the first step and I said to her, ‘Wasn't it nice Dr. Pincock gave you that lollypop?’ She gave her candy.

"Just as I said that, I fell, she holding my left hand, and I went down on my right knee and my left foot hooked up on that first step."

The Court: Did you so testify?

\* \* \* \* \*

A. Yes, I testified to that, but I was walking.

Q. And you didn't say anything about slipping, did you?

A. Well, I slipped. I fell, tripped over the twig as I went down.

Q. Did you say anything about slipping in your deposition that I just showed you, before you came to the first step where you say you fell?

\* \* \* \* \*

60 Q. I believe that you testified a few minutes ago that you slipped before you came to the first step. Is that true? A. After the first step is when I slipped and fell.

Q. Then when you came to the second step, the step that you fell on— A. Yes, that is where I slipped and fell.

Q. After you fell, I understand you to say that you found a twig in the heel of your shoe. A. Yes.

Q. What shoes was that, Mrs. D'Ambrosia, the left or the right? A. The left.

Q. And just where was that twig hooked in the heel of your shoe? A. Under the heel.

Q. Was the heel pulled apart? A. It was loosened.

Q. And was it in the loosened part of the heel where the twig was caught? A. No, it wasn't in the loosened part.

Q. Can you show us just where the twig was caught  
61 in the heel? Could you show us on your shoe? A.

Yes. I have a low-heel shoe on.

Q. Could you show the Court and the jury? A. See (indicating)?

Q. Could you take your shoe off and put it up where we all can see it? A. That was the shoe; the heel. The twig lodged under there (indicating). It loosened this



part (indicating), what we call the shank of the shoe. The twig was here and loosened it. It caught me up like that (indicating).

Q. What was holding the twig on to the shoe? A. The edge of that step.

Q. The edge of the step? A. With that twig under it like that (indicating).

Q. So when you picked the shoe up, the twig would fall off, is that right? A. When I tried to come back, I couldn't move. I pulled forward, trying to get myself forward, because I felt I was stuck. My little girl wanted me to move and I got halfway up. A man came up the walk and he said, "Can I help you?" I finally got up and pulled this foot up and I was all swollen here (indicating).

Q. Before we get to that, we are talking about the twig.

A. The twig was there.

62 Q. The twig was still in your shoe when you got up off the ground? When you got up off the ground, was the twig in the heel of your shoe? A. Laying on the ground under the shoe.

Q. It was laying on the ground? A. Under the shoe.

Q. And not stuck to the shoe? A. No.

Q. Was it stuck to the shoe in any way? A. No.

Q. Then it didn't get hooked on to the shoe, did it? It was under the shoe? A. It lodged under the shoe.

Q. But not hooked on to the shoe? A. Not that it stuck under there.

Q. Then, as you lifted up your foot, the twig fell off? The twig stayed right on the sidewalk? A. Right there where my foot was. I couldn't move. The twig was right there with the shoe.

Q. When you lifted your foot up, was the twig on your shoe or on the pavement? A. It was on the shoe before I got up.

Q. After you got up, Mrs. D'Ambrosia? A. It was on the ground.



Q. Then the twig was never stuck to the shoe or  
63 the heel? A. Well, I was on the step.

Q. How big was this twig? A. About 14 inches  
long and as big around as my finger.

\* \* \* \* \*  
64 Q. Just one more question on this accident itself.

As I understand it, or your testimony is that you  
don't know where this twig came from, is that correct?  
A. Where it came from?

Q. You don't know where it came from? A. No, I don't.

Q. You don't know how it got on the sidewalk? A. No,  
I don't.

Q. And you don't know how long it had been there be-  
fore you fell? A. No, I don't.

Q. And you didn't see it before you fell? A. No.

Q. And you didn't see it before you went into the doctors'  
office? A. I didn't take notice.

\* \* \* \* \*  
69 Q. In relation to that testimony, Mr Cooney has

asked you about the deposition that you gave in his  
office on May 10, 1950 and I want to ask you first whether  
you have ever testified in this case, either here or in Mr.  
Cooney's office, that you fell on any other place than this  
second step.

Do you understand my question? A. No, it is not very  
clear to me.

Q. All right, I will withdraw the question.

In the deposition on page 14, he asked you this question:

"Question: Let me stop you right there. That is the  
first step?

"Answer: After those five or six steps."

And I show you the photograph which is Plaintiffs' Ex-  
hibit 3. Now, when you speak of the first step after  
70 the five or six, which step are you speaking about,  
as shown by the photograph? A. This one (indicat-  
ing). This is the first step after I leave those—

The Court: Keep your voice up.

The Witness: This is the first step after I leave those five there (indicating).

Mr. Gallagher: I would like to hand the jury this other photograph, which is the same as that one (indicating). This is Plaintiffs' Exhibit 2 and, in speaking of the first step, Mrs. D'Ambrosia has her finger on this flat area here after the five or six steps.

(The photograph exhibit was passed among the jury.)

By Mr. Gallagher:

Q. The question was: "The first step after the five or six?"

"Answer: After the first step of the office.

"Question: Did you walk down these five or six steps all right?"

The Court: Is this a question to the witness or are you testifying to the jury?

Mr. Gallagher: I am reading it to the jury.

The Court: Place it in the form of a question to the witness.

Mr. Gallagher: My question to the witness is: did  
71 she testify as I am reading from this deposition.

The Court: Very well.

Mr. Gallagher: And I am simply directing my voice that way so the jury can follow me.

By Mr. Gallagher:

Q. Now, the question is:

"Question: The first step after the five or six?

"Answer: After the first step of the office.

"Question: Did you walk down these five or six steps all right?

"Answer: Fine, perfectly.

"Question: You had no trouble on that?

"Answer: No.



“Question: Then you walked along and you came to another step and stepped down?”

“Answer: That is right, the first step.”

Is the first step, where you have your finger on that photograph, after the five or six steps? A. This is what I consider the first step, yes.

Q. (Reading)—

“Question: Now, is that where you fell?”

“Answer: That is where I fell.”

You so testified in your deposition? A. After the first step, yes.

Q. When you say “After the first step,” did you  
72 mean on this first level below the five or six steps or the level below that?

Mr. Cooney: Your Honor, I object to that. She has already testified where she has fallen. She has testified that what Mr. Gallagher read is correct and that that is her testimony. It seems to me now that he is trying to cross-examine his own witness.

Mr. Gallagher: No, I am not. I am trying to clear up a misunderstanding.

Mr. Cooney: The answer speaks for itself. Mr. Gallagher just read it from the deposition. She said “that is where I fell on the first step.” I don’t think he has a right to cross-examine his own witness.

The Court: What do you say, Mr. Gallagher?

Mr. Gallagher: I am not attempting to cross-examine my witness. There is an obvious misunderstanding. She said she fell after the first step. That is the elevation after the five or six steps but Mr. Cooney interprets it as if she said she fell on that first level, and that isn’t what she said at any time. That is all I am trying to clear up.

The Court: Are you finished?

Mr. Gallagher: Yes.

Mr. Cooney: I believe her testimony is in black and white and speaks for itself.



The Court: Madam Reporter, read the question to me.

\* \* \* \* \*

74 The Court: Did you, when you went into the doctors' office on September 6, 1949, Mrs. D'Ambrosia, see any twigs or branches on the sidewalk, when you went in?

The Witness: Your Honor, I didn't take notice.

The Court: Did you see any other twigs or branches on the sidewalk when you came out, other than the one you saw in your shoe? Did you see any other twigs or branches at all?

The Witness: I didn't look around.

\* \* \* \* \*

75 **Carolyn Hannah Snyder Pincock**

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. State your full name, Dr. Pincock. A. Carolyn Hannah Snyder Pincock.

Q. You are a physician? A. Yes.

Q. A pediatrician? A. Yes, sir.

Q. How long have you practiced medicine? A. I graduated in 1934 and I have been in private practice of medicine since 1936.

Q. On September 6, 1949, you and your husband, Dr. Glen Pincock, maintained offices at 4000 16th Street, Northwest? A. Yes, sir.

Q. And you had your residence there also? A. Yes, sir.

Q. The front part of your house is fitted up as offices? A. Yes, sir.

76 Q. Do you recall September 6, 1949, the day that Mrs. D'Ambrosia fell on the walk in front of your offices? A. Yes, sir.

Q. Do you recall what your routine was on that day?  
A. Yes, sir; I can give it to you directly from the record.

Q. All right. A. My telephone hours between 8 and 9 a. m. I went on one house call—excuse me—I saw three patients; 9:30, 9:45 and 10. Then I went on a house call and returned for lunch. I started seeing patients at 12 and saw them through 6 o'clock at fifteen minute intervals.

Q. Your telephone hours, you said, from 8 to 9 in the morning? A. 8 to 9 a. m.

Q. You were tied up from 8 a. m. to 6 p. m. with patients?  
A. That is right.

Q. Either in your office or out? A. That is right.

Q. And on that day, you saw Mrs. D'Ambrosia's daughter? A. Yes, sir.

Q. Among others. You gave her an examination and a booster shot? A. Yes, sir.

77 Q. At approximately what time of the day? A.  
Her appointment was at 2 o'clock. I probably saw her a little later.

Q. You employ a lady who looks after your house? A.  
We employ two maids.

Q. Did you at that time employ two maids? A. Yes, sir.

Q. Full time? A. No, sir.

Q. You employed one maid full time? A. Yes, sir.

Q. And she looked after the house? A. Yes, sir.

Q. You and Dr. Pincock have some children? A. Yes, sir.

Q. She did the housework and got the meals and things of that sort? A. Some; yes.

Q. Who was the other maid that you employed? A. She was a day-worker.

Q. And she came in on Thursday to clean your offices?  
A. Yes, sir.

Q. She wasn't there any other time during the week?  
A. No, sir.

Q. This accident occurred on a Tuesday? A. Yes, sir.



78 Q. What was the routine for cleaning this front walk leading into the offices? A. The housemaid, who is our full-time employee, thoroughly cleans the walk once a week. It is also her duty to inspect the walk each day as she comes in and if it is necessary to clean the walk, in her judgment—I leave it up to her judgment—to clean it other than once a week.

Q. Does she have any particular day during the week when she is required to clean it? A. No, sir. She is a very intelligent girl and I leave it up to her discretion.

Q. When she comes in in the morning, she is required to look at the walk? A. Yes, sir. She comes right over it.

Q. And if it needs cleaning, she goes out and does it? A. Yes, sir.

Q. What time does she come to the house in the morning? A. Between 7 and 7:30 a. m.

Q. If she were to clean, it would be early in the morning? A. 8 to 8:30 at the time that I am busy on the telephone, after she has given the children their breakfast.

Q. Then she would go out and clean the walk if it needed it? A. Yes, sir.

79 Q. That would be once a week? A. She does it thoroughly once a week and any other day it was necessary.

Q. If she did it on any other day, it would be between 8 and 8:30? A. Yes, sir, except Thursday.

Q. That is her day off? A. At the time of the accident, she was there half a day. She is now off all day.

Q. But she had no particular day at the time she was required to do a general cleaning? A. Once a week she was to clean it thoroughly and every other day that was necessary.

Q. Do you know if she cleaned it on the day of the fall? A. I do not.

Q. You, yourself, didn't go in or out of this front entrance during the day of the accident? A. No, sir.

Q. In entering and leaving your home, you go out by the side entrance? A. That is correct.

Q. On the other side of the house? A. Correct.

Q. You go directly from there to your garage and  
80 take your car and go on your calls? A. Yes, sir.

Q. There are trees and shrubbery in your front yard, are there not? A. Yes, sir.

\* \* \* \* \*

Mr. Gallagher: Dr. Glen Pincock.

Thereupon,

**Glen Pincock**

was called as a witness by the plaintiffs and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. You are Dr. Glen Pincock? A. Yes, sir.

Q. And you are the husband of Dr. Carolyn Pincock? A. Yes, sir.

Q. And you both conduct a medical practice at 4000 16th Street, Northwest? A. Yes, sir.

Q. Dr. Pincock, I am going to ask you a question  
81 that I neglected to ask your wife. Perhaps you can answer it and, if not, I will recall her.

On September 6, 1949, do you know approximately how many patients came in and out of your office on that day or on an average day. A. Well, she has testified that there were three in the morning. I have office hours in the morning myself and, according to my records, I saw nine patients that morning before I left.

I have office hours usually running from 9 to about 11:30 so then I would leave and other patients that she would see would start at 12 o'clock, as she testified, and would be at fifteen-minute intervals up until 2 when the patients were supposed to have arrived.



Q. Would that be something over twenty patients? A. Probably twenty up to the time that the patient arrived.

Q. Then there would be other patients after that? A. That is correct.

Q. You both had office hours after that? A. Hers continued until 6 o'clock. Mine usually start again at 4 o'clock in the afternoon, running to about 5:30 and then usually—this being Tuesday, however, that would have been the end of my regular office hours. On Monday, Wednesday, and Friday, I have evening office hours starting at 82 6 o'clock, running to 7 or 8 or whenever I finish.

Q. How many patients would you say, Doctor, came in and out, including your patients and Dr. Carolyn's patients on an average day? A. Roughly between 40 and 50.

Q. And would there be more on days when you had evening hours? A. Yes.

Q. On the day when you had evening hours, how many would that add? A. Another six, maybe, in the evening.

Q. Approximately 50 on an average day and 56 on a day when you had evening hours? A. Roughly.

Q. These premises at 4000 16th Street are owned by you and Dr. Carolyn? A. That is correct.

Q. And that includes the walk on which this fall occurred? A. It was constructed in the building of the house.

Q. And you people maintain and repair it? A. Yes.

Q. You recall the day of this fall, do you not, Doctor, September 6, 1949? A. Yes, sir.

83 Q. Did you, on that day, enter or leave by the office door where this walk leads to? A. Not to my knowledge.

Q. Your practice is the same as your wife's; you leave by the side door and go to the garage and take your car and go on your calls, is that right? A. That is correct.

Q. I take it you had no occasion to observe this front walk the day the fall occurred. Occasionally I walk around the yard, if I have a little extra time, to see how things

are going, as far as plants and things of that nature are concerned.

Q. Do you have any recollection of looking at the walk on this day? A. I have no idea.

\* \* \* \* \*

119

## PROCEEDINGS

Mr. Gallagher: The plaintiffs have concluded their case in chief, Your Honor.

Mr. Cooney: I have a motion.

\* \* \* \* \*

The Court: The Court, of course, approaches its problem in this case with a great deal of sympathy for the plaintiff. The Court has witnessed spinal disc operations when they were unique and unusual in the medical field and probably before some of the witnesses who testified yesterday had heard of spinal disc operations themselves. The Court has witnessed the difficulty and the pain with which a person must compete after such an operation.

The Court recently sprained its own ankle with a result  
ing hemotoma or hemotoba and is wearing the same type  
of ankle support that the medical men have pre-  
120 scribed for the lady plaintiff in this case. In fact,  
the Court's symptoms were considerably aggravated  
yesterday by the testimony of the doctors who apparently  
anticipate pains which the Court has not as yet experienced  
but undoubtedly will.

I say this because I think it is important for these litigants to realize that a Court is not a cold, immobile piece of stone that does not attempt to evaluate the facts in any case upon the bases of a human experience that is susceptible to the same difficulties and problems that are the litigants themselves.

The law is very well established that it is the responsibility of the plaintiff in a case of this kind to prove negligence on the part of the defendants. That, fundamentally, is the issue before the Court at this time. Have the plain-



tiffs proved that the defendants were negligent in this case?

The female occupier, in the law, the status of an invitee in so far as her relationship with the defendants is concerned because she enters upon the defendants' premises by an express or implied invitation for a business purpose. Toward an invitee, those who have joined in the invitation, be it express or implied, are obliged to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee and to refrain from active negligence. If there

is a danger attending upon the entry and if such  
121 danger arises from conditions not readily apparent to the senses and if the owner of the premises has actual knowledge of them or if they are discoverable in the exercise of ordinary care, it is the duty of the owner to give reasonable warning of such danger to the invitee.

I cite this accepted quotation of the law because of the element emphasized by plaintiffs' counsel relating to the pitch or angle of the walk adjoining the defendants' offices. In other words, we have the condition here in the pitch or slope of the walk which is readily apparent to the senses of any person using it. Consequently, I think that in so far as any inherent danger from the pitch of the sidewalk is concerned, that it being readily ascertainable by the plaintiff or the invitee in the exercise of her or their senses, that the plaintiff cannot invoke any doctrine that would place any unusual or extraordinary degree of care upon the defendants.

We pass then to the question of the twig. The Court has reviewed the cases cited by counsel on both sides, in addition to some 20 or 30 other cases which the Court anticipated counsel on one side or the other might cite. The facts in most of the cases are the distinguishing factor or element between the cases. It seems to the Court that substantially the law is the same in all cases. Certain  
122 cases, because of their facts, fall on one side of the dividing line and certain cases fall on the other. As

a matter of fact, the Court observes in the Washington Market case in 19 D. C. Appeals, that the Court of Appeals in the paragraph that counsel cited italicized the words "due to the facts in this case" or substantially that expression.

The Court concludes in this case that the plaintiff has failed to establish negligence on the part of these defendants. The Court believes that there has been no showing as to the length of time in which the twig was upon the premises. The Court believes that if it permitted the case to go to the jury, it would be requiring the jury to guess as to the length of time that had elapsed since the the twig fell upon the premises.

Requiring the jury to so guess would place the Court in a position where it would completely ignore the necessity for some actual or constructive knowledge on the part of the defendants. Accordingly, the Court feels that it is required, by the law, to grant the defendants' motion for a directed verdict in this case.

If the Marshal will bring the jury into the court room, the Court will explained what has transpired and discharged the jury.

(At 10:55 o'clock a. m. the jury returned into the court room and the following occurred:)

The Court: Ladies and gentlemen of the jury, it is the practice, in the civil jury cases, that when the plaintiff has completed the presentation of the plaintiffs' case, the defendant moves for a direct verdict. This motion is normally generally made out of the presence of the jury in order that counsel may not be restrained in their arguments and in order that if the Court rules adversely to the motion the jurors will not be prejudiced by some belief that the Court thinks the plaintiff is entitled to recover in the case.

When the Court asked you to step into the jury room, Mr. Cooney, in behalf of the defendants, moved the Court to direct a verdict in behalf of the defendants. Without



attempting to paraphrase Mr. Cooney's representation to the Court, I may say that the basis for this motion is, fundamentally, that the plaintiffs have not proved that the defendants were negligent.

The law is that, in order for a plaintiff or for plaintiffs to recover from defendants for injuries or accidents, it must be first proved by a preponderance of the evidence that the defendant or defendants were negligent.

Negligence is the failure to exercise ordinary care in the discharge of your legal duties and responsibilities. Negligence is the failure to do what an ordinarily prudent person would do in the discharge of their own responsibilities. That is an unsatisfactory but a very brief description.

The question then before the Court is: Have the plaintiffs proved that these defendants were negligent?

124 The Court has reviewed 30 or 40 cases upon this point. Counsel have cited the cases supporting their sides of the case.

The Court has considered them all and has concluded that it must direct a verdict in this case in behalf of the defendants. This doesn't mean that the plaintiff didn't fall. It doesn't mean that she has not had a great deal of pain and suffering and inconvenience and expense, but the Court believes that if it required you to pass upon the matter of liability in this case, it would require you to guess how long that twig or branch had been on that sidewalk. You don't know whether it was there one minute or one hour or one day. There was no showing there was an accumulation of twigs or branches or that there were so many trees that these defendants had some unusual responsibility for having that sidewalk patrolled or checked more frequently than they did. In brief, I repeat you would be required to go into the jury room and guess how long that branch had been there. You would have to guess as to cause of the fall in the light of the testimony about the step and so on. The Court doesn't believe that the

rights of the plaintiffs or the defendants should be decided by guess. The law says that the plaintiffs must prove their case by a preponderance of the evidence.

The Court concludes, as a matter of law in this case, that the plaintiffs have not so proved, and the Court has reluctantly, I must say, because it is difficult for the  
125 Court to make these rulings in this type of case but nevertheless it is the Court's responsibility, consequently, the Court has granted the defendants' motion for a directed verdict in this case. This means that the case is taken away from you; that there is nothing more for you to decide in this case and you are discharged from further responsibilities in this case.

\* \* \* \* \*









No. 11,720

BRIEF OF APPELLEES

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

QUINTINA D'AMBROSIO, and  
FRED G. D'AMBROSIO

*Appellants*

VS.

DR. CAROLYN S. PINCOCK, and  
DR. GLENN PINCOCK

*Appellees*

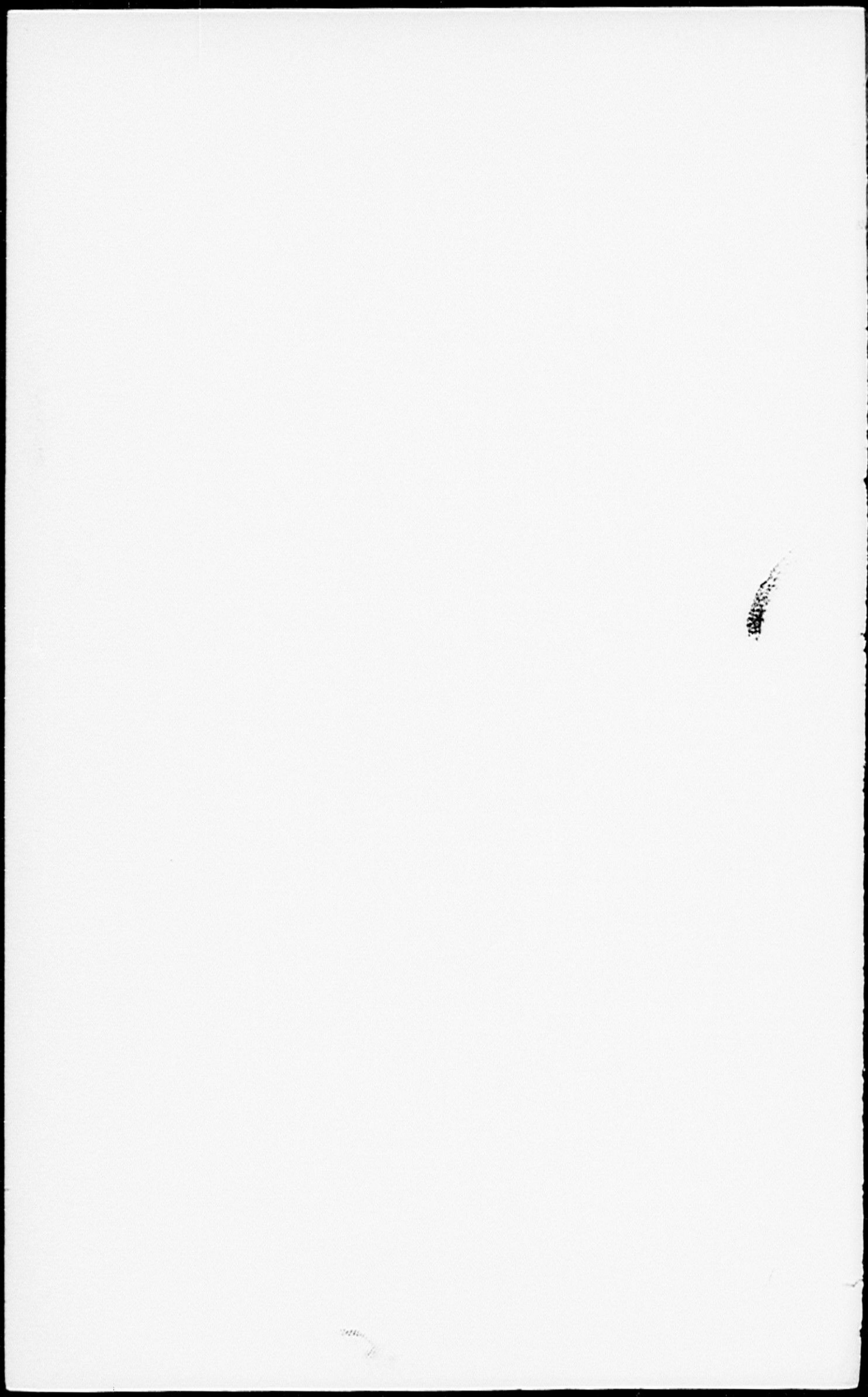
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Appeal from the United States District Court  
for the District of Columbia

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United States Court of Appeals  
For the  
District of Columbia Circuit  
FILED SEP 23 1953  
Joseph H. Stewart  
CLERK





No. 11,720

**QUESTION PRESENTED**

The appellant's statement of question is correct.





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# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 11,720

---

QUINTINA D'AMBROSIO, and  
FRED G. D'AMBROSIO

*Appellants*

vs.

DR. CAROLYN S. PINCOCK, and  
DR. GLENN PINCOCK

*Appellees*

---

Appeal from the United States District Court  
for the District of Columbia

---

## **BRIEF FOR APPELLEES**

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### **STATEMENT OF THE CASE**

The appellees, Dr. Carolyn S. Pincock and Dr. Glenn Pincock, are practicing physicians in the District of Columbia and maintain their offices in the residence at 4000 Sixteenth Street, Northwest, in the District of Columbia.

This action was brought by the appellant, Mrs. Quintina D'Ambrosio, alleging that she fell on the private sidewalk owned and maintained by the appellees, Drs. Pin-



cock, and used by them as an entrance and exit from their professional offices.

Dr. Carolyn S. Pincock is a pediatrician and treats children exclusively, while Dr. Glenn Pincock has a general practice.

On September 6, 1949, appellant, Mrs. Quintina D'Ambrosio, took her seven year old daughter to Dr. Carolyn S. Pincock's office for treatment (Jt. App. 7-8). They arrived at the office between 1:30 p.m. and 1:45 p.m., using the front entrance leading directly into the doctor's office. She left the doctor's office at about a quarter of three and while walking down the private walk in question Mrs. D'Ambrosio alleges that she slipped on a branch of a tree and fell, injuring herself. Just prior to the fall Mrs. D'Ambrosio was leading her child with her left hand, she was carrying two umbrellas—her own and her daughter's—in her right hand and had a pocketbook on her right arm (Jt. App. 9, 16, 18). After she had fallen she was assisted to her feet by a stranger who happened to be passing by. She testified that the branch which was wedged in the heel of her shoe was about fourteen inches long, round and as big around as appellant's finger (Jt. App. 10, 30). The sidewalk in question had a general overall pitch or slope downward in the direction in which the appellant was walking at the time of the fall, of one-half inch in every foot (Pl. Ex. 1). Appellant stated that she had been going to Dr. Pincock's office for approximately seven years, that she was familiar with the doctor's sidewalk and steps, and had never fallen there before. She further stated in answer to the defendant's attorney as follows: "Did you think these were dangerous steps?" Answer: "They were just like any other steps—accidents will happen" (Jt. App. 14). Appellant further stated that the sidewalk was not slippery and all she knew was that they were made of stone (Jt. App. 15). Appellant testified that it was not an

unusually windy day for that time of the year, and that she did not notice anything on the sidewalk at all leading from the main sidewalk on Sixteenth Street up to the doctor's office, and that she didn't notice any debris of any kind on the sidewalk (Jt. App. 16). She testified that there was no difference in the weather when she came out of the doctor's office compared with when she went in (Jt. App. 18). Appellant stated that she did not know where this twig came from; she did not know how it got onto the sidewalk and she did not know how long it had been there before she fell, and that she didn't see it before she fell (Jt. App. 30). In answer to questions by the Court the appellant stated that she did not notice any twigs or branches on the sidewalk when she went into the doctor's office on September 6, 1949, and that she did not look around to see whether there were any other twigs or branches on the sidewalk when she came out other than the one she saw in her shoe.

The appellant's attorney introduced into the evidence plaintiff's Exhibit No. 1, which is a chart of the entrance walk and steps of Dr. Pincock's residence and which was prepared by someone from the building inspector's office (Jt. App. 6). The appellant introduced into evidence two photographs as plaintiff's Exhibits 2 and 3, which were admitted into evidence. However, the Court accepted them with the following qualifications and so advised the jury:

"That this accident occurred on September 6, 1949. There are in the pictures that the Court is admitting into evidence some branches of a tree showing in the left-hand side of the picture. The Court cautions the ladies and gentlemen of the jury that you should not draw any conclusions from these photographs as to the condition of the tree that adjoined or was near the walk on September 6, 1949. Obviously, the photograph of the tree taken in March would look substantially different from a photograph taken of the tree in 1949.



“Also, since three years has elapsed between the happening of the accident and the date of these photographs, the tree would have grown substantially, the branches would probably be longer, higher and so on, so that you should not draw any conclusions with reference to the tree or branches from these photographs which the Court is admitting in evidence solely for the purpose of showing you the steps and walk where this accident occurred (Jt. App. 11).”

Dr. Carolyn Pincock stated that she has a housemaid who is a full time employee and thoroughly cleans the walk once a week, that it is her duty to inspect this walk in question each day as she comes in, and if it is necessary to clean the walk in her judgment, she does so; that when she comes in in the morning she is required to look the walk over and if it needs cleaning she goes out and does it. She arrives at the house between 7:00 and 7:30 a.m. each morning (Jt. App. 35).

### SUMMARY OF ARGUMENT

The appellant under “statement of points” states that the Trial Court erred in granting defendants’ motion for a directed verdict and in not permitting the jury to pass upon the factual question of whether the defendants were negligent. The appellant then in his Summary of Argument and in his argument cites several principles of law and several cases in which he attempts to sustain his views. In the interest of uniformity and orderliness on this, the appellee will undertake to discuss each of the cases cited by the appellant in his brief substantially in sequence in which the cases are raised in his argument beginning on page 4 of the brief of the appellant.

1. The cases which have been cited by the appellant will not bear any resemblance to the facts in the present case, and the appellees agree that the law which has been applied to the facts in each case by the appellant is proper.



The appellee will discuss briefly the case of *Woolworth vs. Williams*, 59 App. D. C. 347, *Brodsky vs. Safeway*, A.D. D.C., App. 301, and will attempt to show that the law in this case should apply in the present case.

### ARGUMENT

The appellant, first, states that unusual precautions were required of the appellees and cites three cases:

1. *Hecht Company vs. Harrison*, 78 App. D. C. 93. The facts in that case briefly are that there was a difference in floor levels between two parts of the store which was accompanied by a ramp and the customer walking parallel with the end of the ramp, stepped on, turned his ankle lost his balance and was injured, and that this evidence could justify the jury's finding that the ramp was not reasonably safe. The Court in that case did not state that there were any unusual precautions required of the appellee, but stated that store keepers must use reasonable care to make their floors safe for customers and whatever may be said of an unusually low step, or a step in an unusual position, or an outside ramp which connects an outer door with a sidewalk, we think the jury here would justify in finding that the ramp herein involved was not reasonably safe. The facts in that case and the facts in the present case are entirely different. There is no evidence of any kind in the present case that the sidewalk in question was inherently dangerous, had any unusual slope, nor was the sidewalk constructed in any way or had any danger which was not readily apparent to the senses. You will recall that the appellant had used this same sidewalk for seven years, considered it safe, not slippery and had never fallen on it. The only evidence as to the slope in the sidewalk is by way of a chart which indicates that the walk-way in question is approximately four and one-half feet wide and thirty feet long

and has a general overall pitch or slope downward in the direction in which the appellant was walking at the time of the fall, of one-half inch in every foot. This is not in any way unusual or dangerous and we know of no law that requires sidewalks to be level.

The appellant then cites *Hellyer vs. Sears Roebuck and Company*, 62 App. D. C. 318. Again, the facts are substantially different, and, again, the appellee states that the law in that case is good law according to the facts which are briefly as follows: The plaintiff in that case while descending from one floor to another of defendant's store caught her heel in a metal flashing of step, causing her to fall, and that it was the strip of flashing raised up a little bit and stuck out which caught plaintiff's shoe heel and held it so fast that she fell. The Court stated that if the metal covering of the step was either so constructed that it extended up above the surface of the tread in such a way as to make it dangerous to a person using the step with due care, or if after construction it was allowed to get and remain in that condition, a case of actionable negligence would arise for an injury to an invitee to whom a store owed the duty of exercising ordinary care. The Court nowhere in that case states that there were any unusual precautions required of the appellee.

The appellants then cite the case of *McKay vs. Parkwood Owners, Inc.*, 78 App. D. C. 260. Again, the facts are substantially different in the present case than in the case cited by the appellant. In their case the defendants had a building which was occupied largely by doctors who were treating infirm, feeble and injured people. That the plaintiff in that case had just recovered from a serious operation, that on entering the elevator after a visit to her doctor she slipped and fell, and that the floor of the elevator had been freshly waxed by agents or employees of the defendants. The evidence in that



case disclosed that the elevator operator employed by the defendants admitted that the floor had just been freshly waxed, and that there was wax on the plaintiff's clothes after she arrived at home. The law in this case is good law according to the facts, but we have no such facts in the present case. In that case there was certainly notice, if notice was required, and there was also a dangerous condition brought on by the defendant. This building contained twenty-six doctors who treated people afflicted with arthritis, defective vision, and feeble minded people. I believe that according to these facts unusual precautions should have been made to keep these elevator floors safe; but we have no such situation involved in the present case. There is no evidence of any kind to show any dangerous condition, there is no evidence to show that either Dr. Pincock treated such type of patients, and the only evidence that Dr. Carolyn Pincock was a pediatrician.

The second point under appellant's argument is that the appellees owed a duty of inspection of the sidewalk, and they cite as their leading case *Market Company vs. Clagett*, 19 App. D. C. 12, and in that case they attempt to show that actual or constructive notice is dispensed with. Again, the facts of the two cases are directly opposite. In that case, the plaintiff entered the market house and as she was walking along the aisles she slipped on a pile of fish beside a fish stall in the aisle, was thrown to the ground and injured. The defendant's claim that they had no actual notice of the presence of the fish in the aisle which had fallen there from a barrel delivered at the stall about fifteen minutes before the accident occurred but that there had been no inspection or patrol after 9:00 o'clock that day by either of the two day watchmen employed by the company. You will note in this case that the fish remained in the aisle for at least fifteen minutes prior to the accident and that there were people employed by the defendant to keep these aisles

clean, and the fact that they did not keep them clean is evident. Therefore, actual notice to the company would not be necessary in this case. According to the facts of this case, you will note that the Court, in its opinion, on page 26, states very emphatically that actual notice is dispensed with. In the present case there is no evidence of any kind how long the twig had been on the sidewalk or where it came from. It could have been there one second up to an hour. It could have been placed there by a stranger under whom the appellees had no control. There was no evidence in the present case that the appellees had any actual or constructive notice that there was anything on the sidewalk, nor that they had time to obtain this notice. In order to allow this case to have gone to a jury the Court would have had to instruct the jury that they would have to guess whether or not this twig had been on the sidewalk for any appreciable length of time. The evidence in the present case shows that this sidewalk was inspected every day by the defendants or their maids, and if the sidewalk needed cleaning it was cleaned. There is no rule of law that would require these appellees to keep a person posted in front of the building at all times during business hours to watch for such things. The evidence clearly shows that reasonable inspections were made, which is all that is required under our law.

The appellee then states the case of *Peigh vs. Baltimore and Ohio Railroad Company*, decided by this Court on April 9, 1953, in which the Court stated that in a case of this type the evidence must be considered in the light most favorable to the appellant. This Court is familiar with that case and the facts are entirely different, and, in my opinion, should not even be considered as a parallel to the present case. In that case it was held that, as a matter of law, the plaintiff's recovery was barred by absence of proof of defendant's negligence, and by plaintiff's own contributory negligence, and the point of law



stated by the appellants in that case was discussed by the Court on the issue of contributory negligence.

The next case I believe, and the last case which the appellants cite, is *Sears-Roebuck and Company vs. Patterson*, 76 Fed. (2d) 243. This case was decided by the Circuit Court of Appeals for the Eighth Circuit, and they cite this case attempting to show that there was a failure on appellee's part to adequately inspect the sidewalk. The facts briefly in the case cited by the appellants are as follows: The plaintiff in that case tripped on some rope or twine which had not been removed from the floor by the defendant's employee after unwrapping an evergreen tree. Certainly this was a question for the jury as to whether or not the defendant was negligent in failing to keep the aisles clean inasmuch as it was the defendant's own employee who left the rope or twine on the floor. In the present case there is no evidence of any kind that any employee, or the defendants themselves, left this twig on th sidewalk nor is there any evidence as to where it came from or how long it had been there.

The appellant has attempted by the above case to show negligence on the part of the appellee by trying to fit the facts of the present case with the facts in the case which they have cited. This they have failed to do. Briefly, this appellant with a child of seven years of age entered the appellee's office at approximately 1:30 to 1:45 in the afternoon. The appellant had been going over the same sidewalk for seven years. She did not consider it dangerous or unusual. She had never fallen there before; she did not notice any debris or branches of a tree on the sidewalk as she entered. There was nothing unusual about the weather. After about an hour in the appellee's office, she started out down the same sidewalk and states that she slipped on a twig of a tree, that she does not know from whence it came or how long it had been there. The evidence shows that the sidewalk in

question was thoroughly cleaned once a week and was inspected every day, and if the sidewalk needed cleaning it was so done. Towards an invitee, those who have joined in the invitation are obliged to exercise ordinary care to keep the premises in a reasonably safe condition for the invitee and to refrain from an act of negligence. If there is a danger apparent upon entry and if such danger arises from conditions not readily apparent to the senses, and if the owner of the premises has actual knowledge of them or if they are discoverable in the exercise of ordinary care, it is the duty of the owner to give reasonable warning. In *Woolworth vs. Williams*, 59 App. D. C. 347, the plaintiff in that case slipped and fell on the floor of the defendant's store. She stated that after she fell she noticed an oval-shaped spot on the floor, that it was slightly raised above the floor and that her heel went into the spot and caused her to slip. The plaintiff stated that the defendant allowed and permitted some greasy, slippery substance to be and remain upon such floor. The Court stated in that case that the burden of proving defendant's negligence is upon the plaintiff and the mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence nor does it create a presumption of negligence, on the contrary the legal presumption is that reasonable care was exercised. The Court further states on page 348 that the defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise. Until it is established that the accident was occasioned through the negligence of defendant's employees, or as a result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery. The Court further stated in that case that the plaintiff made no attempt to show how or by whom the spot was created, nor how long it had existed. In the present case the plaintiff has made no attempt to show



how or by whom the twig got onto the sidewalk, or how long it had been there. There is an inference by the appellant that it might have fallen from a nearby tree. There is no evidence that there were any dead branches of any kind on the trees. The Court further stated the plaintiff cannot sustain her case by merely showing that a spot of oil was on the floor, and this appellant cannot sustain her case by merely showing that a twig was on the sidewalk.

The question of notice is too well established in our courts to go too much into detail.

I believe the leading case among several others would be *Brodsky vs. Safeway Stores, Inc.*, 80 App. D. C., 301. In that case the appellant charged that the appellee allowed vegetable debris to be on the floor of its store and so caused appellant, a customer, to fall and be injured. There was no evidence as to how this debris got there or how long it had been there. The Trial Court directed a verdict, which was affirmed by this Court, stating if there had been evidence that the condition complained of had continued for a substantial time there might have been a question for the jury.

### CONCLUSION

For the reasons heretofore stated, the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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